(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
The United States Department of Navy, Kingsville Naval Air Station, Kingsville, Texas	TSCA Appeal No. 99-2
Docket No. TSCA VI-736C(L)	

[Decided March 17, 2000]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

KINGSVILLE NAVAL AIR STATION

TSCA Appeal No. 99-2

FINAL DECISION

Decided March 17, 2000

Syllabus

This is an interlocutory appeal by the United States Department of the Navy, Kingsville Naval Air Station, Kingsville, Texas ("Navy") from an order (the "Order") arising out of an administrative enforcement action by the U.S. EPA Region VI (the "Region") against Navy. The Region alleges that Navy violated regulations known as the "Disclosure Rule," which were promulgated under the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA") and which require, among other things, that, before the lessee is obligated under any "contract to * * * lease" housing, the lessor shall make certain disclosures regarding lead-based paint and lead-based paint hazards located in the housing. At issue in this matter is the Navy's admitted noncompliance with the Disclosure Rule in connection with housing provided by it pursuant to eleven Residency Occupancy Agreements ("ROAs") to certain enlisted and officer personnel and their families.

By the Order, the Presiding Officer found that the eleven ROAs are "contracts to lease" within the meaning of RLBPHRA and the Disclosure Rule and that Navy was required to comply with the Disclosure Rule in connection with those ROAs. In this interlocutory appeal, Navy argues that the Order erred in a number of respects. As one of its arguments, Navy focuses on the phrase "contract * * * to lease" found in the RLBPHRA and the Disclosure Rule, and argues that the disclosure requirement is not applicable to Navy's ROAs with enlisted and officer personnel because (a) ROAs are not "leases" and (b) ROAs are not "contracts." Navy argues that the Presiding Officer erred by applying Texas law to determine whether the ROAs are "contracts to lease."

HELD: Reversed and complaint is dismissed. On the narrow issue of whether state law is controlling, the Region does not necessarily disagree that the Order is in error. The Order cannot be upheld based upon the Presiding Officer's analysis, which relied on Texas law. The Board, however, does not adopt Navy's contention that the federal property and contract law principles cited by Navy are dispositive as to whether a

transaction is a "contract to lease" for purposes of the Disclosure Rule and RLBPHRA. Whether the eleven ROAs at issue in this case are "leases" or "contracts to lease" is a question of statutory construction. It is not clear that an ROA would necessarily be included or excluded from any so-called "ordinary" definition of the term lease. An ROA possesses many of the characteristics of an ordinary lease; yet at the same time, it has many attributes that make it sui generis, found only in the military context and lacking any apparent counterpart in civilian circles. However, the Region's suggested alternative interpretation, that "lease" under the Disclosure Rule and RLBPHRA means any consensual residency agreement, is breathtakingly overbroad. It cannot serve as a principled basis for upholding the Order's grant of accelerated decision in this case. Fairly read, the Disclosure Rule does not bear any contemplation of ROAs -- arrangements peculiar to the military establishment.

The Board declines to exercise its authority, as the Agency's final decisionmaker in this case, to fashion through this adjudicative proceeding a legally binding interpretation of the terms "lease" and "contract to lease" under the Disclosure Rule and the RLBPHRA. If the Agency intends to regulate ROAs under the Disclosure Rule, it needs to develop a workable and supportable interpretation of the Disclosure Rule to that end and, as appropriate, amend the Disclosure Rule to reflect that interpretation.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

This is an interlocutory appeal by the United States Department of the Navy, Kingsville Naval Air Station, Kingsville, Texas ("Navy") from an order, dated February 18, 1999, issued by Administrative Law Judge Stephen J. McGuire (the "Presiding Officer"), titled "Order on Respondent's Motions for Accelerated Decision and for Discovery and on Complainant's Motions for Accelerated Decision and to Strike" (the "Order") arising out of an administrative enforcement action by the United States Environmental Protection Agency Region VI (the "Region") against Navy. For the following reasons, we reverse the Presiding Officer's Order and dismiss the Region's Complaint.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Congress passed Title X of the Housing and Community Development Act of 1992 under the common name of the "Residential Lead-Based Paint Hazard Reduction Act of 1992" ("RLBPHRA"), Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in part at 42 U.S.C. and 15 U.S.C.). The stated purposes of RLBPHRA are, among other things, "to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible" and "to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government." 42 U.S.C. § 4851a(1), (6).[1] In order to accomplish its goals, RLBPHRA amended the Toxic Substance Control Act ("TSCA"), *see* RLBPHRA § 1021(a), 15 U.S.C. §§ 2681-2692, and required the promulgation of regulations governing disclosure of lead-based paint hazards in "target housing" offered for "sale or lease." *See* RLBPHRA § 1018(a), 42 U.S.C. § 4852d(a).

The amendments to TSCA included the addition of "Title IV – Lead Exposure Reduction," consisting of TSCA sections 401 to 412. *See* RLBPHRA § 1021(a), 15 U.S.C. §§ 2681-2692. TSCA section 408 provides in relevant part as follows:

> Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal * * *

[1]The RLBPHRA is codified in part at 42 U.S.C. §§ 4851, *et seq*.

> requirements, both substantive and procedural * * * respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent as any nongovernmental entity is subject to such requirements, including the payment of reasonable service charges. The Federal * * * substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines regardless of whether such penalties or fines are punitive or coercive in nature, or whether imposed for isolated, intermittent or continuing violations.

15 U.S.C. § 2688. TSCA section 409 further provides that it is "unlawful for any person to fail or refuse to comply with a provision of (TSCA) subchapter [IV - Lead Exposure Reduction] or with any rule or order issued under this subchapter." 15 U.S.C. § 2689. Civil penalties for violations of TSCA section 409 may be imposed pursuant to TSCA section 16(a). 15 U.S.C. § 2615(a).

RLBPHRA also required the Secretary of the Department of Housing and Urban Development ("HUD") and the Administrator of EPA to promulgate regulations for the disclosure of "lead-based paint hazards in target housing which is offered for sale or lease." RLBPHRA § 1018(a)(1), 42 U.S.C. § 4852d(a)(1). These regulations were to require that, "before the purchaser or lessee is obligated under any contract to purchase or lease housing," the seller or lessor shall make certain disclosures to the purchaser or tenant. *Id.* In March 1996, EPA and HUD issued joint regulations known as the "Real Estate Notification and Disclosure Rule." EPA's regulations are codified at 40 C.F.R. part 745, subpart F – Disclosures of Known Lead-based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property (the "Disclosure Rule"), and HUDs regulations are codified at 24 C.F.R. part 35, subpart H.

The Disclosure Rule generally provides that certain "activities shall be completed before the purchaser or lessee is obligated under any contract to purchase or lease target housing that is not otherwise an exempt transaction." 40 C.F.R. § 745.107(a). As relevant to this case, the activities that are required to be completed include the following: (1) the seller or lessor shall provide the purchaser or lessee with an EPA-approved lead hazard information pamphlet, 40 C.F.R. § 745.107(a)(1); (2) each contract to lease target housing shall include an attachment containing a Lead Warning Statement consisting of certain language specified by the regulations, *id.* § 745.113(b)(1); (3) each contract to lease target housing shall disclose the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, *id.* § 745.113(b)(2); (4) each contract to lease target housing shall include a list of any records or reports that are available pertaining to lead-based paint and/or lead-based paint hazards, *id.* § 745.113(b)(3); (5) each contract to lease target housing shall include a statement by the purchaser affirming receipt of the information specified above, *id.* § 745.113(b)(4); and (6) each contract to lease target housing shall include the signatures of the lessors and lessees certifying the accuracy of their statements, *id.* § 745.113(b)(6).

Both RLBPHRA and the Disclosure Rule broadly define "target housing" as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." *Compare* 42 U.S.C. § 4851b(27) *with* 40 C.F.R. § 745.103. Neither RLBPHRA nor the Disclosure Rule define the terms "lease" or "contract to lease." The Disclosure Rule, however, defines the term "lessor" as "any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, Indian tribes, and nonprofit organizations." 40 C.F.R. § 45.103.

B. *Factual and Procedural Background*

On July 28, 1998, the Region filed an administrative complaint against Navy commencing this enforcement matter (the "Complaint"). Navy filed its answer to the Complaint on August 17, 1998 (the "Answer").

Navy is a component of the Department of Defense of the Executive Branch of the United States Government. Complaint ¶ 1; Answer ¶ 1. Navy operates the Kingsville Naval Air Station located in Kingsville, Texas (the "Kingsville Station"). Complaint ¶ 2; Answer ¶ 2. As part of its operations at the Kingsville Station, Navy provides housing to its enlisted and officer personnel and their families. Complaint ¶ 3; Answer ¶ 3. Navy manages the housing located at the Kingsville Station. *Id.*

In April 1996, Navy prepared a "Lead Management Plan" for abating lead-based paint hazards in housing located at Kingsville Station. Complaint ¶ 8; Answer ¶ 8. The housing units that are at issue in this matter are identified in the Lead Management Plan as containing lead-based paint. *Id.*

On April 12, 1997, the Region sent information to Navy concerning the requirements of the Disclosure Rule. Complaint ¶ 9; Answer ¶ 9.[2] On April 17, 1997, a lead enforcement coordinator from the Region contacted the Navy's housing director for the Kingsville Station regarding the Disclosure Rule and confirmed that Navy had received the information concerning the requirements of the Disclosure Rule. Complaint ¶ 10; Answer ¶ 10 (admitting that the telephone conversation occurred).

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[2]Navy admits receiving "certain documents" from the Region on April 12, 1997, and states that "the documents speak for themselves." Answer ¶ 9.

From September through November 10, 1997, Navy entered into eleven "Residency Occupancy Agreements" ("ROAs") with enlisted and officer personnel for those personnel and their families to occupy housing at the Kingsville Station. Complaint ¶ 4; Answer ¶ 4. The housing units that are the subject of those eleven ROAs were constructed prior to 1978. Complaint ¶ 3; Answer ¶ 3.

Navy entered into the eleven ROAs without providing an EPA-approved lead hazard information pamphlet to the occupants. Complaint ¶ 14; Answer ¶ 14 (asserting that the lead hazard information pamphlet was provided to each occupant on or about November 12-13, 1997). The eleven ROAs at issue in this matter did not contain, as an attachment or within the ROAs, a lead warning statement with the language specified by 40 C.F.R. § 745.113(b)(1). Complaint ¶ 17; Answer ¶ 17 (stating that a lead warning is set forth in the ROAs, although not conforming to the specific regulatory language, and stating that a further warning containing the regulatorily prescribed language was provided on or about November 12-13, 1997). The ROAs did not include, as an attachment or within the ROAs, a statement by Navy disclosing the presence of known lead-based paint in the housing units and did not disclose a list of records or reports pertaining to lead-based paint hazards in the housing units, and did not include the occupants' certified statement that they received such information. Complaint ¶¶ 22, 26, 30, 34; Answer ¶¶ 22, 26, 30, 34 (alleging that the required information was provided to the occupants on or about November 12-13, 1997).

The Region also alleged in its Complaint that the housing located at Kingsville Station, which Navy provides to its enlisted and officer personnel and their families, is "target housing" as defined in the Disclosure Rule, Complaint ¶ 3, that the eleven ROAs described above are "contracts to lease" within the meaning of the Disclosure Rule, *id.* ¶ 5, and that Navy is a "lessor" with respect to the ROA transactions. *Id.* ¶ 6. The Region further alleged in the Complaint that Navy's failure to comply with the Disclosure Rule in connection with the eleven ROAs

constituted sixty-six violations of TSCA section 409 for which a civil penalty of $408,375 should be imposed pursuant to TSCA section 16.

Both in its answers to the numbered paragraphs of the Complaint and in its affirmative defenses, Navy raised a number of objections to liability for the violations alleged in the Complaint. In particular, Navy stated that EPA lacks authority to assess civil penalties against Navy on the grounds that Congress has not granted such authority by a "clear statement." Answer ¶ 37. Navy also stated that its ROAs are not the sale or lease of housing; instead, it alleged that it "assigned" the housing as "quarters" pursuant to 37 U.S.C. § 403, and that such assignment does not create a landlord-tenant relationship and does not confer a leasehold or other property interest to the occupants. Answer ¶ 40. Navy also argued that the ROAs are not contracts. Answer ¶ 41. Thereafter, the Navy filed a total of seven motions for accelerated decision and one motion for authority to conduct discovery. In its motions for accelerated decision, Navy reiterated the arguments described above and it also argued that the ROAs are not "contracts" and that EPA exceeded its rulemaking authority by defining the term "lessor" to include "government agencies." The Region filed oppositions to the Navy's motions and also filed five motions for accelerated decision in its favor and four motions to strike portions of the Navy's Answer.

By the Order, the Presiding Officer denied all of Navy's motions for accelerated decision and granted the Region's motions for accelerated decision. The Presiding Officer also denied Navy's motion for discovery and the Region's motions to strike. In particular, the Order found that the ROAs are "contracts to lease" within the meaning of RLPBHRA and the Disclosure Rule, that the Region has authority to assess civil penalties against Navy, and that the EPA did not exceed its rulemaking authority by defining the term "lessor" in the Disclosure Rule to include "government agencies."

Navy has now raised three separate issues on appeal. Briefly summarized, those issues are as follows:

> (1) Navy focuses on the phrase "contract * * * to lease" found in the RLBPHRA's directive authorizing the promulgation of the Disclosure Rule, *see* 42 U.S.C. § 4852d, and argues that the disclosure requirement is not applicable to Navy's ROAs with enlisted and officer personnel because (a) ROAs are not "leases" and (b) ROAs are not "contracts;"
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> (2) Navy argues that RLBPHRA and TSCA do not contain the requisite "express" statement authorizing EPA to assess civil penalties against another Executive Branch department; and
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> (3) Navy argues that the EPA exceeded its statutory rulemaking authority by including "government agencies" within the requirements of the Disclosure Rule.

Appellant-Respondent's Brief (June 10, 1999) ("Navy's Appellate Brief") at 1. As discussed below, we find the first of these three issues warrants reversal of the Order and dismissal of the Complaint. Accordingly, we do not reach the second and third issue.

II. *DISCUSSION*

By its first argument on appeal, Navy contends that the ROAs between Navy and its enlisted and officer personnel are not transactions subject to the Disclosure Rule because, according to Navy, the Disclosure Rule is only applicable to "contracts to lease" and the ROAs are neither contracts nor leases. Navy's Appellate Brief at 4-17. Navy's argument is premised first on the language of RLBPHRA. In particular, RLBPHRA required HUD and EPA to promulgate regulations for the disclosure of lead-based paint hazards in target housing "which is offered for sale or lease." RLBPHRA § 1018(a)(1), 42 U.S.C. § 4852d(a)(1). RLBPHRA further directed that the regulations shall

require the disclosures be made "before the purchaser or lessee is obligated under any contract to * * * lease housing." *Id.* Navy argues that, by these statutory phrases, Congress made the disclosure requirements only applicable to "contracts to lease."[3]

Navy argues that the Presiding Officer erred when he applied Texas law to determine whether the eleven ROAs at issue in this case are "contracts to lease." Navy's Appellate Brief at 4. Navy argues that when the federal government has title to the land, federal law, not state law, governs and that under federal law the ROAs at issue are not leases. *Id.* Navy argues that the ROAs cannot be leases under federal law because, under the Constitution, only Congress has the power to dispose of property belonging to the United States, a lease is a disposition of property, and Congress has not authorized Navy to lease the housing units at issue in this case. *Id.* at 4-5. Instead, Navy argues that Congress has only granted Navy the authority to "assign" military members to housing. *Id.* at 5. Further, Navy argues that ROAs are not "contracts" because military members serve by appointment, not by contract, and their pay and benefits are governed exclusively by statute. *Id.* at10-11. Thus, Navy argues that, since the eleven ROA transactions are not contracts to lease under federal law, Navy was not required to comply with the requirements of the Disclosure Rule and cannot be found liable as charged in the Complaint.

Upon review, we conclude that we cannot uphold the Presiding Officer's Order. In analyzing the question of whether the ROAs at issue in this case are "leases," the Order began with the premise that "[i]t is well-settled that the law of the place where the premises are located and where the lease was executed governs the rights of the parties to the

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[3]In promulgating the Disclosure Rule, HUD and EPA employed similar language insofar as the regulations state that the required disclosures shall be "completed before the purchaser or lessee is obligated under any contract to * * * lease target housing that is not otherwise an exempt transaction." 40 C.F.R. § 745.107(a).

lease." Order at 6. As noted, Navy argues that, while this statement is generally true, it has no application where title to the property is held by the U.S. Government. *See, e.g, California, ex rel. State Lands Commissioner v. United States*, 457 U.S. 273, 281-82 (1982). On the narrow issue of whether state law is controlling, the Region does not necessarily disagree that the Order is in error in this respect. *See* Appellee's Appellate Brief ("Region's Appellate Brief") at 6, 16 ("Appellee does not necessarily disagree with Appellant that the law of Texas should not have been used to determine whether the ROAs were contracts to lease under Section 1018 * * *."). Based on this erroneous premise, the Order repeatedly turned to the law of Texas, where Kingsville Station is located, to determine whether the ROAs are "leases." *See, e.g.*, Order at 6, 9-10, 12, 13-14. Accordingly, we cannot uphold the Order based upon the Presiding Officer's analysis, which relied on Texas law. However, as discussed below, we also do not adopt Navy's contention that the federal property and contract law cited by Navy is dispositive with respect to whether a transaction is a "contract to lease" for purposes of the Disclosure Rule and RLBPHRA section 1018.

The question of whether the eleven ROAs at issue in this case are "leases" or "contracts to lease" is a question of statutory construction. Navy, in effect, argues that the following cannon of statutory construction is controlling in this case: "when Congress passes a new statute, it is assumed to be aware of all previous statutes on the same subject." Navy's Appellate Brief at 9, citing *Erlenbaugh v. United States*, 409 U.S. 339, 344 (1972). Based on this cannon of construction, Navy argues that "Congress must be deemed to have been aware of the limitations on the disposal of federal property when it passed the [R]LBPHRA." *Id.* Navy also argues that "[a] basic principle of statutory construction is that where words in a statute are not defined, they must be given their ordinary meaning." Appellant-Respondent's Rebuttal to Appellee's Appellate Brief (July 28, 1999) ("Navy's Rebuttal Brief") at 2. Navy argues that the ordinary meaning of lease is "a contractual obligation binding and enforceable at law

against both the lessor and lessee to convey and accept a leasehold interest in real property." *Id.*, citing *State Nat'l Bank of El Paso v. United States*, 509 F.2d 832, 835 (5th Cir. 1975).

It is not clear that an ROA would necessarily be included or excluded from any so-called "ordinary" definition of the term lease, whether it be that which the Navy propounds or some common variant found in Black's Law Dictionary.[4] An ROA possesses many of the characteristics of an ordinary lease; yet at the same time, it has many attributes that make it *sui generis*,[5] found only in the military context and lacking any apparent counterpart in civilian circles. At bottom, to interpret the meaning of the term lease, it is incumbent upon us recognize that, ultimately "[s]tatutory construction 'is a holistic endeavor,' and at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *National Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439 (1993) (citations omitted). The Supreme Court also has stated that "[o]ver and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* (citations omitted). Although not citing these authorities, the Region has attempted to offer

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[4]Black's Law Dictionary defines the term "lease" as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usu. rent." Black's Law Dictionary 898 (7th Ed. 1999).

[5]The Presiding Officer observed that the ROAs at issue in this case have many of the characteristics of a traditional lease in that the ROAs "creat[e] the extent and boundary of the property; a definite and agreed term and price; the tenant's right to possess and occupy the property; consideration to support the lease; [and] the benefit and detriment of the leasing parties." Order at 14. In contrast, Navy argues that its ROAs cannot be leases because, among other things, Navy only has authority to "assign" military members to housing, military pay and benefits are governed by statute, not by contract or common law, and violations of the terms of the ROA may be enforced as a felony under military law. *See* Navy's Appellate Brief at 5-6, 11-12, 15.

a somewhat more holistic reading of the statute in an effort to show that an accelerated decision in the Region's favor can be upheld on an alternative theory.

The Region states that both the Presiding Officer's "order and Appellant's numerous briefs enter into a largely unnecessary analysis of the lessor-lessee relationship." Region's Appellate Brief at 6. The Region argues that our focus should not be on the "lease" and "contract" language in RLBPHRA section 1018, but rather our focus should be on the requirements of TSCA section 408. Specifically, the Region argues that TSCA section 408 "does not merely impose duties on federal agencies that 'lease' housing," *Id.* at 7. "Rather Section 408 imposes requirements on federal entities 'having jurisdiction over any property or facility' which may result in a lead hazard or 'engage in any activity * * * which may result' in a lead hazard." *Id.*[6] The Region argues further that "[t]he nature of the relationship between the property owner federal agency and the tenant service members and their families, and the arcane, complicated laws that may apply to various aspects of those relationships, are not relevant to the fact that under Section 408 of TSCA the Appellant has a duty to disclose the presence of lead-based paint and lead-based paint hazards to those who occupy naval housing that was built before 1978 – 'target housing.'" *Id.* This analysis must be rejected because it is not entirely correct.

The Region is correct that TSCA section 408 imposes requirements on federal entities having "jurisdiction" over property, or "engaged in any activity," that may result in a lead-based paint hazard. The Region, however, is not correct that we can turn to the requirements of section 408 to avoid confronting the "lease" and "contract to lease" language in the Disclosure Rule and RLBPHRA. Section 408, itself,

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[6]The Region did, however, concede at oral argument that in order to establish liability it must "find a contract to lease." Hearing Transcript (Oct. 28, 1999) ("Tr.") at 55.

does not require federal entities to disclose lead-based paint hazards to housing occupants. Instead, section 408 provides that such entities "shall be subject to, and comply with, all Federal * * * requirements * * * respecting lead-based paint, lead-based paint activities, and lead-based paint hazards *in the same manner, and to the same extent* as any nongovernmental entity is subject to such requirements." TSCA § 408, 15 U.S.C. § 2688 (emphasis added). Therefore, as applied to the present case, section 408 merely provides that Navy "shall be subject to and comply with" the Disclosure Rule "in the same manner, and to the same extent as any nongovernmental entity."[7] Accordingly, we cannot find that section 408 requires Navy to disclose lead-based paint hazards in housing managed by it, unless we first confront the question of whether Navy's ROA arrangements would fall within the coverage of the Disclosure Rule. This question cannot be resolved without a satisfactory treatment of "lease" and "contract to lease" as used in RLBPHRA and the Disclosure Rule.

The Region also argues that, in determining the scope of transactions covered by the Disclosure Rule and RLBPHRA section 1018, the focus should be on the broad definition of "target housing" and on the policies and purposes of RLBPHRA, rather than on "lease" or "contract to lease." Region's Brief at 13-16. In this vein, the Region notes that "target housing" means any housing constructed prior to 1978, with only four exceptions. *Id.* at 13. (The Disclosure Rule specifically excepts from its scope: sales at foreclosure, short-term leases of 100 days or less, leases of target housing that have been found to be lead-based paint free, and renewals of leases in which the disclosures have previously been made. 40 C.F.R. § 745.101.) The Region argues that "[i]f the structure does not fit into one of these exceptions, then it is considered target housing and the owner of the structure must comply with the Disclosure Rule before entering into *any type of agreement*, oral or written such as ROA, with another person who desires to reside

[7]The Region conceded as much at oral argument. Tr. at 43.

in the target housing." Region's Appellate Brief at 13 (emphasis added). The Region argues that Navy's construction of the terms "lease" and "contract to lease" seeks "to carve out a fifth exception (i.e., for military housing) so that its ROAs do not come under Section 1018 and the Disclosure Rule." *Id.* at 13-14. We disagree. Navy's arguments appropriately go to the issue whether ROAs are "leases" or "contracts to lease" within the scope of the Disclosure Rule. Fairly read, RLBPHRA and the Disclosure Rule establish two independent requirements for regulatory jurisdiction – first, that the housing in question be target housing and, second, that the transaction that produces occupancy constitute a "lease" or "contract to lease." The Region cannot by artful interpretation of the first eviscerate the second.

As to the more precise issue of the meaning of "lease" and "contract to lease," the Region argues that these terms have a unique meaning under RLBPHRA and that it is not necessary for either state law or federal property law to be consulted to ascertain the proper construction of those terms under this statute. *See* Region's Appellate Brief at 21. As noted above, the Region suggests that "lease" under RLBPHRA means "any type of agreement." *Id*. at 13. More specifically, the Region argues that a "contract to lease" for purposes of section 1018 "is created when an owner of target housing voluntarily enters into an agreement with another to have that person reside in the target housing." *Id*. at 16. The Region also states that its "only purpose for classifying the ROAs as 'contracts to lease' is to establish that the Appellant consented to have the military families reside at the Kingsville NAS in the target housing." *Id*. at 10; *see also id*. at 13 (arguing that the question is "whether there is a consensual residency agreement between the parties (i.e., the owner and the occupant)."). In addition, the Region argues that "[t]he terms 'contract to lease' 'lessor' and 'lessee' as used in Section 1018 and the Disclosure Rule do not have the same meaning as in real property law, state contract law, or the Property Clause of the U.S. Constitution, * * * and those terms are merely used to identify who should give the Lead information and who should get it * * *." *Id.* at 18.

These arguments, however, cannot serve as an alternative rationale for upholding the Order.

As noted above, the Region is correct that the question of what "lease" and "contract to lease" mean in this case is necessarily a question of what those terms mean as used by Congress in RLBPHRA section 1018. Nevertheless, despite the absence of definitions of those terms in the statute, the broad purposes of the statute do not alone grant the Region license to create a wholly new and almost boundless interpretation of "lease" for the first time in this case. The Region's alternative theory, that "lease" under section 1018 means any consensual residency agreement, does not appear to bear any reasonable relationship to the manner in which that term is used in other contexts.

For example, "consensual residency agreement" is so broad that it would embrace numerous familial living arrangements that fall well outside any conventional sense of the meaning of "lease." The following discussion during oral argument illustrates the potential breadth of the Region's interpretation that "lease" means any "consensual residency agreement:"

> JUDGE REICH: So, if I own a 1976-built condominium apartment and I allow my brother-in-law to use our guest bedroom for 6 months, have I now subjected myself to [the Disclosure Rule]? Do I have to give him a lead warning based on the fact that there is a consensual occupancy of target housing?
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> EPA COUNSEL: It depends. If he is only staying in the bedroom, the guest room, no, but if he is renting out the entire apartment –
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> * * * * * * *

> When I am using the term "rent," I am saying if there is some type of agreement where you have allowed your brother-in-law to reside in the entire apartment.
>
> JUDGE REICH: He is going to use the bedroom. He is going to use the bathroom. He is going to use the kitchen. I mean, he is going to be freely about the apartment, and now I am afraid that I have subjected myself to liability under the statute.
>
> EPA COUNSEL: Well, it is our position that in that case, if he is going to reside in the entire apartment, there should be some disclosure to provide information to your brother-in-law.

Tr. at 57-58. In addition, the Region stated that the Disclosure Rule also applies when an elderly parent, who can no longer live alone, is invited to live with one of the parent's adult children. *Id*. at 58-62. We are loath to take such an expansive view without a more clear direction from Congress that it intended to regulate such familial arrangements. Because the Region's suggested interpretation is breathtakingly overbroad, it cannot serve as a principled basis for upholding the Order's grant of accelerated decision in this case.

While the Board does have the authority, as the Agency's final decisionmaker in this case,[8] to fashion through this adjudicative proceeding a legally binding interpretation of the terms "lease" and "contract to lease" under the Disclosure Rule and section 1018 of the RLBPHRA, we decline to exercise that authority here. Fairly read, the Disclosure Rule does not bear any contemplation of ROAs –

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[8] *See, e.g., In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 542-43 & n. 22 (EAB 1998): *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 508-09 & n.30 (EAB 1994).

arrangements peculiar to the military establishment. Not surprisingly then, there is, as best we can discern, no indication that the issue of ROA coverage was identified during the interagency review process that accompanied the rule's promulgation. *See* Tr. at 48-49 (noting that, with the exception of barracks, there is no mention of military housing in the preamble to the Disclosure Rule). In this regard, we find it significant that EPA and HUD promulgated a definition of the term "lessor" in the Disclosure Rule as including "government agencies" in order to "clarify that term and to identify the regulated community which would be covered by that term," Region's Appellate Brief at 32, yet at the same time EPA and HUD did not choose during the rulemaking to clarify the meaning of "lease" – a term for which the Region now seeks to offer a unique definition, uncontrolled by common usage or otherwise applicable real estate law. If the Agency intends to regulate ROAs under the Disclosure Rule, it needs to develop a workable and supportable interpretation of the Disclosure Rule to that end and, as appropriate, amend the Disclosure Rule to reflect that interpretation.[9]

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[9]We do, however, note that the Department of Defense has issued a memorandum to the Navy, among others, which states in part as follows:

> These rules [40 C.F.R. pt. 745, subpt. F] apply to DoD family housing built before 1978 and to their disposal by lease or sale. Occupancy of DoD housing by military members and their families is considered to be leasing of housing, with regard to these rules. * * * Compliance with disclosure rules must be documented. * * * Disclosure of potential LBP [lead-based paint] hazards to occupants of military housing is an essential part of a comprehensive LBP management program. We request that you incorporate the responsibilities and procedures for implementing these requirements into your Components' LBP Management Plans.

Order at 4, quoting Department of Defense Memorandum from the Office of the Under Secretary of Defense to among others, the Assistant Secretary of the Navy (Feb. 18, 1997). Given the serious and unquestioned health effects of lead-based paint, we would

(continued...)

III. *CONCLUSION*

For the foregoing reasons, we reverse the Order and dismiss the Region's complaint.

So ordered.

[9](...continued)
expect Navy to comply with the disclosure requirements as contemplated by this Department of Defense memorandum.